But that the consideration inures to the benefit of the promisor should be no answer to the defense of the statute: its sole importance is as showing whether the parties contemplated an absolute or a collateral liability.[12] However, in requiring that the consideration move from the creditor and that it also be a benefit to the promisor, the courts are recognizing the elements of a quasi-contractual right. In the case to which the exception to the statute may be traced there is a suggestion of a quasi-contractual right, and in it, as in many of the later decisions, it is to be noticed that the amount of recovery in quasi-contract would have exactly equalled the amount recovered on the oral promise.[13] Yet even if it would have been considerably less than the recovery on the promise, full justice would nevertheless have been done by restricting the promisee to a recovery back of the benefit unconscionably retained by the promisor. In a number of decisions a tendency toward a stricter observance of the statute is noticeable.[14] And it is doubtful whether the courts will allow recovery on the oral promise in cases where the default for which the promise answers is considerably larger than the benefit acquired by the promisor.[15]

THE DOCTRINE OF EQUITABLE ELECTION. — Broadly stated the doctrine of equitable election is that "he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it." [1] The typical application of this rule is where a testator purports to leave to B property belonging to A and in the same instrument gives property to A. Equity will put A to his election either to adopt the benefit received under the will, losing all claim to his own property left to B, or to take against the will, retaining such property.[2] In the latter case, though by the better authority the gift is not wholly forfeited,[3] equity will sequester the benefits received under the will, for the compensation of the disappointed donee.[4] But the party bound to elect is entitled to a bill to ascertain the relative values of the two gifts.[5] Originally derived from the civil law,[6] the doctrine is now applied to deeds as well as wills.[7] Its foundation is commonly said to be the intention of the maker of the instrument, in furtherance of which equity implies a condition to the valid gift.[8] To imply such a condition when the testator knowingly disposes of property belonging to one of the beneficiaries under the will, seems in truth to be carrying out his intent. But the fact that the doctrine applies with equal force when the property

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[12] See 4 HARV. L. REV. 290.
[13] Williams *v.* Leper, 3 Burr. 1886; Wooten *v.* Wilcox, 87 Ga. 474.
[14] *Cf.* White *v.* Rintoul, 108 N. Y. 222, 227; Carleton *v.* Floyd, 192 Mass. 204.
[15] National Bank *v.* Smith, 107 Wis. 574; Lang *v.* Henry, 54 N. H. 57, 61.

[1] 2 Jarman, Wills, 5 Am. ed., § 1.
[2] Noys *v.* Mordaunt, 2 Vern. 581. See 18 HARV. L. REV. 302.
[3] Gretton *v.* Haward, 1 Swanst. 409; Van Dyke's Appeal, 60 Pa. St. 481, 492. *Contra*, Sugden, Powers, 8 ed., § 576.
[4] Gretton *v.* Haward, *supra;* Brown *v.* Brown, 42 Minn. 270.
[5] See Douglas *v.* Douglas, L. R. 12 Eq. 617, 637.
[6] Story, Eq. Jur., 13 ed., § 1078.
[7] Moore *v.* Butler, 2 Sch. & Lef. 249, 266; Barrier *v.* Kelly, 82 Miss. 233.
[8] Dillon *v.* Parker, 1 Swanst. 359, note, 401.

is given under an erroneous belief of ownership,[9] goes to show that it is wholly independent of the testator's intention.[10] That it rests on the broad principle that he who seeks equity must do equity, seems therefore the preferable view.[11]

Two exceptions to the general rule have been recognized by the courts. The first is where a will, defectively executed as to lands belonging to the testator, contains a valid gift to the heir. Before the modern statutes this raised the question of an election by the heir between the legacy and the lands rightfully his by descent. When the devise of realty was inoperative because of the Statute of Frauds, it was uniformly held that the heir need not elect;[12] for the courts hesitated to accomplish indirectly, by compelling an election, a result which the Statute prevented the testators accomplishing directly; they therefore refused to look at the will for the purpose of raising an election. Like considerations were applicable where the will was ineffectual to dispose of after-acquired land; yet in such a case the heir was put to his election.[13] And in a situation possible at the present time as well as under early statutes, namely, where the devise was inoperative because the lands in question were situated in a foreign jurisdiction, a like result was reached.[14]

The second exception was made in the case of the will of an infant. Because of the testator's incapacity such an instrument, inoperative under the early law as to land, but valid as to a gift of personalty, was regarded as insufficient to put the heir to his election.[15] On the ground that there must always be personal competency, a leading writer brings within this exception the will of a married woman.[16] But his view finds little support.[17] However it may have been in former times, under modern statutes giving married women full power to acquire, hold, and dispose of property, there is no reason not to apply the general rule of election. Accordingly, where, under the English Married Women's Property Act,[18] a married woman bequeathed to a stranger property belonging to her husband, and in the same will left the husband an annuity from her separate estate, the husband was compelled to elect. *In re Harris*, 1909, 2 Ch. 206.

THE CONCURRENT JURISDICTION OF THE FEDERAL AND STATE COURTS. — Congress having provided for the exercise of the judicial power of the

[9] Whistler *v.* Webster, 2 Ves. Jr. 366; Barrier *v.* Kelly, *supra.*

[10] Haynes, Outlines of Equity, 5 ed., pp. 263, 265. The only intent necessary is merely an intent to dispose of property in fact not the testator's own. Cooper *v.* Cooper, 7 L. R. H. L. 53, 70; Havens *v.* Sackett, 15 N. Y. 365.

[11] Peters *v.* Bain, 133 U. S. 670, 695; 1 Pom. Eq. Jur., 3 ed., § 465.

[12] Sheddon *v.* Goodrich, 8 Ves. Jr. 481; Melchor *v.* Burger, 1 Dev. & B. (Eq.) 634. But if an express condition was attached to the gift of personalty the heir was compelled to elect. Boughton *v.* Boughton, 2 Ves. 12 (a distinction much criticized). See Melchor *v.* Burger, *supra.*

[13] Thellusson *v.* Woodford, 13 Ves. Jr. 209; McElfresh *v.* Schley, 2 Gill (Md.) 181. *Contra*, City of Phila. *v.* Davis, 1 Whart. (Pa.) 490.

[14] Brodie *v.* Barry, 2 Ves. & B. 127; Van Dyke's Appeal, *supra.*

[15] Hearle *v.* Greenbank, 1 Ves. 298.

[16] 2 Jarman, Wills, 5 Am. ed., § 9.

[17] *In re* Burgh Lawson, 34 W. R. 39. But see Coutts *v.* Acworth, L. R. 9 Eq. 519. In Rich *v.* Cockell, 9 Ves. Jr. 369, often cited for this view, the point is left undecided. See also Blaiklock *v.* Grindle, L. R. 7 Eq. 215, 219.

[18] 45 & 46 Vict. c. 75, § 1 (1882).